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The Erie Rule and Long-Arm Statutes

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COMMENTS

THE ERIE RULE AND LONG-ARM STATUTES

I. History and Development of the Erie Rule

In the beginning there was the Rules of Decision Act[1] which said:

> The laws of the several states, except where the Constitution or treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials of common law in the courts of the United States, in cases where they apply.

This Act of Congress was construed by the federal courts to mean that in a federal court exercising diversity jurisdiction the *statutes* of the several states would control a decision, where there was no countervailing federal statute. However, when a state did not have a statute directly on point, the federal courts were not bound to follow what might otherwise be valid state law. *Swift v. Tyson*[2] branded this construction of the Rules of Decision Act on the jurisprudence of the federal courts in 1842; the federal courts thus embarked upon the perilous course of determining federal common law, which might or might not coincide with the common law (decisional law) of the courts of the state in which the federal court sat.

The justification for the development of the federal common law system was largely the authority of Congress to create a federal court system. The rationale upon which the doctrine was built had logical merit but practical fallacies. Federal common law, it was reasoned, would encourage uniformity in common law among the several states. This in turn would lead to a more just system of law in the overall picture. Consequently, when a federal judge in a diversity case deemed unsound or unjust the relevant common law of the state in which his court sat, he simply adopted something sounder and wiser. This approach, it was hoped, would point out to the state court the error in its policy, and the state would, in the interest of uniformity (and better law?) follow the federal lead.

Unfortunately, judges being also human beings, the state courts most often did not take the federal "hint" and tenaciously insisted upon interpreting their law in their way. For the out-of-state litigant, who qualified for diversity jurisdiction in the federal courts of such a state, this duality of jurisprudence had decided advantages. A non-resident plaintiff could make his choice of courts in the first instance. A non-resident defendant (which was less common prior to long-arm statutes)

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[1] 28 U.S.C. § 725, Act. of Sept. 24, 1789. This language was substantially unchanged until 1948 when it was changed to read: The laws of the several states, except where the constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be recorded as rules of decisions in civil actions in the courts of the United States, in cases where they apply. June 25, 1948. c. 646, 62 Stat. 944. 28 U.S.C. § 1652.

[2] 16 Pet. 1 (1842).

could at least have the benefit of the federal court, where the jurisprudence was not bound by the same policy considrations as the state court. Ease of removal of the action after it was commenced further facilitated the forum-shopping.

The demise of such glaring disparities of law and blatant forum-shopping came about in a most unusual manner. A Pennsylvania citizen was injured in Pennsylvania while walking along a much-used path on a railroad right-of-way. The Pennsylvania citizen sued the New York railroad corporation in the federal court in New York. The railroad contended that Pennsylvania common law, which limited the duty owed to unauthorized persons using such a path, should be applied. The court applied what it deemed to be the federal common law on the subject, and the plaintiff recovered. The United States Supreme Court granted certorari and proceeded to immortalize the case of *Erie R.R. v. Tompkins*.[3]

The Court in the *Erie* decision made it very clear that it wished to remove the area of "general law," or federal common law, from federal jurisprudence in order to facilitate equal protection of the law and to discourage forum-shopping. The Court is emphatic in its denunciation of the *Swift v. Tyson*[4] doctrine.

> Experience in applying the doctrine of *Swift v. Tyson,* had revealed its defects, political and social; and the benefits expected to flow from the rule did not accrue. Persistence of state court in their own opinions on questions of common law prevented uniformity; and the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties.
> . . . *Swift v. Tyson* introduced grave discrimination by non-citizens against citizens. . . .[5]
> . . . Thus, the doctrine rendered impossible equal protection of the laws.[6]

(This final conclusion, it should be noted, was not even mentioned in the arguments of counsel published with the text of the opinion.)

In place of the now discredited federal common law, the Court declares that the law of the State shall henceforth control.

> Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case in the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or part of the law of

[3] 304 U.S. 64 (1938).
[4] 16 Pet. 1 (1842).
[5] 304 U.S. 64, 74 (1938).
[6] *Id.* at 75.

> torts. And no clause in the Constitution purports to confer such a power upon the federal courts.[7]

The immortality now accorded this decision is largely due to the language above employed. As the concurring opinion of Mr. Justice Reed[8] points out, the Court went beyond what was necessary to decide the case. In addition to overruling *Swift v. Tyson,* and declaring that state decisional law is binding on a federal court, the Court suggests that it is unconstitutional for Congress to prescribe substantive rules of decisions. This is an issue which was neither briefed nor argued. Mr. Justice Reed suggests that the language of the Court removes the authority of Congress to establish federal court procedure, at least when such procedure involves substantive rights.

> If the opinion commits this Court to the position that the Congress is without power to declare what rules of substantive law is hazy but no one doubts federal power over procedure. . . . The Judiciary Article and the "necessary and proper" clause of Article One may fully authorize legislation, such as this section of the Judiciary Act.[9]

A perhaps ironic aftermath of *Erie v. Tompkins* is that the case was remanded with directions to proceed in conformity with the Court's opinion, which by all that can be gleaned from the specific references of the Court, required a decision on the negligence law of Pennsylvania. If in fact the state law was to control, the conflicts rule of the state of New York (where the case was brought) should have been the prime concern. This realization came later, however, when in *Klaxon Co. v. Stentor Co.*[10] the Court required federal Courts in diversity cases to follow state conflict of law rules.

In removing the *Swift v. Tyson* dichotomy of general law-local law, the Court resurrected an equally cumbersome and difficult task for the federal courts—demarcation of the line between substance and procedure. Demarcation could no longer be side-stepped by holding the matter to be "general law." Efforts have been made to unravel this Gordian knot for the last thirty years, but given the present variables at least another thirty years of work remain.

Congress itself may have added to the complexity of the task. At approximately the same time as the decision in *Erie,* the Enabling Act[11] resulted in the Federal Rules of Civil Procedure. The Enabling Act attempts to put beyond all doubt the authority of the Supreme Court to propagate rules of procedure for the federal courts.[12]

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[7] *Id.* at 78.
[8] *Id.* at 90-92.
[9] *Id.* at 91-92.
[10] 313 U.S. 487 (1941).
[11] 28 U.S.C. § 723 (b) (1940) Act of June 19, 1934, ch. 651, § 1, 48 Stat. 1064.
[12] *See* 1966 U.S. Code Cong. & Ad. News 4171 for language supporting broad rule-making powers recently given the Court; specific legislative history of

> The Supreme Court shall have power to prescribe, by general rules, for the district courts of the United States and for the courts of this District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive right of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.[13]

By virtue of the Federal Rules of Civil Procedure, the federal courts were at least apparently beginning with the same definition of "procedure" whenever specific facts made it necessary to make the substantive-procedural distinction required by Erie.

One of the first cases to enunciate the *Erie* requirement that a line be drawn between substance and procedure was *Sibbach v. Wilson & Co.*[14] At issue here was the validity of a Federal Rule which allowed the federal court to require a plaintiff to submit to a physical examination by a court appointed physician. The question arose in a diversity action in Illinois (which did not allow such court orders) based on an injury in Indiana (which did permit such orders). The Court suggests that once a Federal Rule exists on the subject in question, the only issue which may be raised is the authority of the Court to promulgate such a rule—which authority is measured by the Enabling Act.

> The contention of petitioners, in final analysis, is that Rules 35 and 37 are not within the mandate of Congress to this Court. This is the limit of permissible debate, since argument touching the broader questions of Congressional power and of the obligations of the federal courts to apply the substantive law of a state is foreclosed.[15]

Had the above reasoning been adhered to, perhaps much less confusion would have subsequently developed. However, another argument which subsequently found many advocates was advanced by the petitioner. Even assuming the question was procedural because covered by a Federal Rule, the plaintiff (who opposed the order) contended that the Rule abridged a substantial or important right, thus a substantive right was affected and, consequently, the Federal Rule was beyond the scope of the Enabling Act. The Court refuses to embark on a case by case determination of whether a right is "substantial" or "important"; a test is given, however, which appears to be the test for both the substance-procedure distinction and for the scope of the Enabling Act.

> The test must be whether a rule really regulates procedure—the judicial process for enforcing rights and duties recognized by

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the 1934 Act was not to be found in the resources available to this writer but it is submitted that numerous lower court decisions as well as law commentators so interpreted this 1934 grant of authority.

[13] 28 U.S.C. § 723 (b) (1940) Act of June 19, 1934, ch. 651 § 1, 48 Stat. 1064.

[14] 312 U.S. (1941).

[15] *Id.* at 9.

> substantive law and for justly administering remedy and redress for disregard or infraction of them.[16]

Sibbach thus seems to hold that a Federal Rule controls if it is part of the judicial process for enforcing rights or administering remedies. Such a test would appear to cloak the Rules with an aura of validity subject to challenge only when the Rule is beyond the authority of the Court to promulgate. However, subsequent cases with difficult equities have caused the Court to embellish, expand, and perhaps confuse this interpretation.[17]

Guaranty Trust Co. v. York[18] was the next case in which the Court pronounced a test by which to determine whether state law or Federal Rules control in a diversity action. The action here was equitable; the plaintiff was seeking to recover for the breach of a fiduciary obligation involved in a rather complex series of transactions with bonds. Had the action been brought in the state court, the statute of limitations would have barred recovery. The Supreme Court concludes that a similar bar exists as to recovery in the federal courts—the statute of limitations is substantive. The fact that the action is in equity, however, troubles the Court. Pronouncements as to the status of equity actions coupled with the final decision that the statute of limitations must be followed, suggests that the Court may really be delineating "substantial" rather than strictly "substantive" rights.

In discussing the equitable nature of the action, the Court first suggests that a state limitation of remedy is not binding on the federal courts.

> State law cannot define the remedies which a federal court must give simply because a federal court in diversity jurisdiction is available as an alternative tribunal to the State's courts. Contrariwise, a federal court may afford an equitable remedy for a substantive right recognized by a State even though a State court cannot give it.[19]

However, after citing a prior decision holding the principle of *Erie v. Tompkins* applicable to a suit in equity,[20] the Court phrases a new test for the applicability of State law. Essentially, the Court concludes that if the State law would determine the outcome of the litigation, it must be followed.

The language and reasoning of the Court also suggest a concern, as expressed in Erie, that opportunity for forum shopping shall not be provided.

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[16] *Id.* at 14.
[17] It is also possible, if not probable, that the Court has in fact returned essentially to the *Sibbach* test; *see* discussion of *Hanna v. Plumer, infra.*
[18] 326 U.S. 99 (1945).
[19] *Id.* at 106.
[20] Ruhlin v. N.Y. Life Ins. Co., 304 U.S. 202 (1938).

> Here we are dealing with a right to recover derived . . . from one of the States. When, because the plaintiff happens to be a non-resident, such a right is enforceable in a federal as well as in a State court, the forms and mode of enforcing the right may at times, naturally enough, vary because the two judicial systems are not identic. But since a *federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State,* it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State. (emphasis added)[21]

Had the Court limited its language to a conclusion that statutes of limitation are substantive, thus binding upon a federal court, future difficulties arising from this decision might have been greatly reduced. The decision, however, by reference to *Erie,* goes beyond the facts presented.

The Court's language specifically interpreting *Erie* attempted to simplify the problems presented and subsequently became almost talismanic, as a test for application of state law.

> In essence, the intent of [*Erie R.R. v. Tompkins*] was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.[22]

Perhaps the greatest difficulty inherent in the *Guaranty Trust* "outcome determinative" test is its simplicity. The test is a great oversimplification of the real issue; even the most clearly procedural requirement imaginable could determine the outcome of the litigation via dismissal. Suppose, for example, a defendant signed a pleading as the Federal Rules required, and the state law required that pleadings be affirmed (and those not affirmed be stricken); the outcome of the litigation could conceivably be determined by following State law. *Guaranty Trust* seems to indicate that a federal court in such a situation would have to follow state law.

Two years later, when faced with a significantly different problem, the Court evolved something of a variation on the "outcome determinative" test. *Angel v. Bullington,*[23] in effect, concluded that if the State courts closed their doors to the litigation in question, the federal courts must follow suit. This broad pronouncement arose from a very narrow question. The Plaintiff, a citizen of Virginia, had been denied recovery by the supreme court of North Carolina because of a North Carolina statute which barred defeciency judgments in secured sales of realty. The plaintiff then started suit on the same claim in the federal court in

[21] 326 U.S. 99, 108-109 (1945).
[22] *Id.* at 109.
[23] 330 U.S. 183 (1947).

North Carolina on the basis of diversity jurisdiction. The Supreme Court concluded that the federal courts did not have jurisdiction to hear the case.

The denial of jurisdiction was based on alternative grounds. A lengthy discussion of *res judicata* concluded, essentially, that since the state courts had already decided this specific controversy, the federal courts could not redecide it. It does not seem unreasonable to suggest that the Court's antipathy towards forum shopping was given full vent in this case. Considering the policy expressed in *Erie,* the Court was not about to sanction two actions on exactly the same claim.

A further basis for denial of jurisdiction was more explicitly based on the *Erie R.R. v. Tompkins* mandate. The Court points out the North Carolina Supreme Court had authoritatively announced that deficiency judgments are not available in North Carolina courts. Consequently, the federal courts, through diversity jurisdiction, cannot give what the state courts withhold. Since the state courts have closed their doors to this litigant on this question, the federal courts must do likewise.

The door-closing test is useful when the issue of *res judicata* is involved. However, a good argument can be made that the question of *res judicata* is entirely separate from the *Erie* problem of whether the law in question is substantive or procedural (which in turn determines whether state or federal law controls). It is difficult to hypothesize a situation where both issues could be raised as to the same question of law. (Concededly both issues were raised in *Angel,* but better planning by counsel could have avoided this situation.) *Res Judicata* suggests a determination on the merits of a controversy, while a procedural question should not involve the merits of the action at all. Such a distinction, however, was not engrafted onto the test in *Angel,* and the "door-closing" criteria became another talisman for the courts when faced with an *Erie*-type question.

What might be regarded as a triumvirate of state law supremacy developed in 1949. Three cases[24] were decided by the Supreme Court on the same day, and all involved challenges to the Federal Rules on the basis of contrary state law. In each case the applicability of the state law was upheld.

Ragan v. Merchants Transfer Co.[25] was discussed as though it turned on the applicability of the state statute of limitations. However, since prior cases had concluded that state statutes of limitations were substantive and thus controlling, the only really new issue was whether the state or federal definition of "commencing an action" was to operate to toll the statute. The Federal Rules deem an action commenced when

[24] Ragan v. Merchants Transfer Co., 337 U.S. 530 (1949); Woods v. Interstate Realty Co., 337 U.S. 535 (1949); Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949).

[25] 337 U.S. 530 (1949).

the complaint is filed[26] (indeed, the summons cannot be served until the complaint is filed); the state law, however, said an action was commenced only when the summons was served. Here the plaintiff, invoking diversity jurisdiction, filed well within the period of limitations; however, the subsequent service upon defendant was not effectively made until after the statute had run. The Court mentions (but does not consider it significant) that service was in fact made prior to the expiration of the statutory time, but was defective and thus had to be repeated. The significance of the fact that the defendant had actual notice of the action prior to the expiration of the limitation time was not mentioned.[27]

With something less than unimpeachable reasoning, the Court concludes that the state definition of "commencing an action" must control. The plaintiff is thus barred from any relief in any court. The Court accepts the Court of Appeals conclusion "that the requirement of service of summons within the statutory period was an integral part of that state's statute of limitations."[28] In effect what the Court is accepting is a state conclusion that the service of a summons is a matter of substantive law. There is no discussion whether the Enabling Act authorizes a definition of "commencement of an action." Thus, the Court is in fact applying the "substantial" or "important" right criteria it expressly rejected in *Sibbach v. Wilson*.[29]

The Court then applies the "door closing" interpretation of *Erie* and denies plaintiff's recovery.

> Erie R. Co. v. Tompkins . . . was premised on the theory that in diversity cases the rights enjoyed under local law should not vary because enforcement of those rights was sought in the federal court rather than in the state court. If recovery could not be had in the state court, it should be denied in the federal court. . . . It is conceded that if the present case were in a Kansas court it would be barred.[30]
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> Since that cause of action is created by local law, the measure of it is to be found only in local law. It carries the same burden and is subject to the same defenses in the federal court as in the supreme court. . . . It accrues and comes to an end when local law so declares. . . . When local law qualifies or abridges it, the federal court must follow suit.[31]

The language here is broad enough to suggest that *any* qualification or abridgement of a cause of action by a state must be followed by the federal courts, even when there is a Federal Rule that reaches another

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[26] FED. R. CIV. P. 3.
[27] Actual notice, rather than the particular form by which it is given, now appears to be the significant factor. *See* discussion of *Hanna v. Plumer, infra.*
[28] 337 U.S. 530, 532 (1949).
[29] 312 U.S. 1 (1941).
[30] 337 U.S. 530, 532 (1949).
[31] *Id.* at 533.

conclusion or establishes another criterion. Indeed, on the facts of this case, such an interpretation is not unreasonable.

Perhaps the other cases decided on the same day limit the broad sweep of *Ragan*. (However, as there were three separate opinions, the argument is better that the other cases expand the *Ragan* holding). *Woods v. Interstate Realty Co.*[32] involves a state statute which requires a foreign corporation doing business in the state to designate an agent on whom service of process may be made, and, if such is not done, denies the right "to bring or maintain any action or suit in any of the courts of this state." The Supreme Court concludes, largely on the authority of *Angel v. Bullington*,[33] that since the state has closed its doors to the plaintiff foreign corporation, the federal courts must adopt the same course.

The dissent in *Woods* takes issue with the majority for not adhering to their normal position that the lower court's interpretation of state law will be accepted. Here, the Court of Appeals had concluded that the statute was interpreted by the state only to deny state court enforcement to contracts of such foreign corporations; all other remedies were left unimpaired. Thus, the dissent concluded, the federal court had full authority to adjudicate the contract. To conclude otherwise, it is argued, would be to give the state statute a different meaning in the federal court than it had in the state courts.

Cohen v. Beneficial Industrial Loan Corp.[34] was the final member of the trilogy. Here the Court was faced with the question of applicability of a state statute requiring a bond to be posted as a condition precedent to litigation by certain stockholders in stockholder derivative actions. Federal Rule of Civil Procedure listed facts required before such an action could be brought, but did not mention a bond. The Court upholds the bond requirement, and suggests that Erie goes so far as to make state law controlling in all but the details relating to the conduct of the court business.

> But Erie R. Co. v. Tompkins and its progeny have wrought a more far-reaching change in the relationship of state and federal courts and in the application of state law in the latter whereby in diversity cases the federal court administers the state system of law in all except details related to its own conduct of business.[35]

The Court further reasons that even if the requirement of bond is only procedural, it still applies because it is the creation of a liability where none before existed, which in fact is a substantive matter. The Court does engage in a lengthy discussion of stockholder derivative actions, the abuses which grew therefrom, and the logic of the policy which

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[32] 337 U.S. 535 (1949).
[33] 330 U.S. 183 (1947).
[34] 337 U.S. 541 (1949).
[35] *Id.* at 555.

the state is enunciating in the bond requirement. In this context, the Court makes a statement which may prove to be the key to the rationale of all three decisions:

> "A state may set the terms on which it will permit litigations in its courts."[36]

This statement, in view of the prior decisions enforcing the "door-closing" test of applicability of state law, suggests that the court is really approaching a question of jurisdiction in the guise of a substance v. procedure determination.

The partial dissent of Mr. Justice Douglas and Mr. Justice Frankfurter hints at the necessity of making a distinction between jurisdictional questions and *Erie*-type questions.

> Each state has numerous regulations governing the institution of suits in its courts. They may favor the litigation or they may affect it adversely. But they do not fall under the principle of Erie R. Co. v. Tompkins . . . unless they define, qualify or delimit the cause of action or otherwise relate to it.[37]

The dissent of Mr. Justice Rutledge, however, may be the harbinger of what appears to be the current attitude of the court. The dissent is specifically made applicable to the entire trilogy, which he aptly categorizes.

> . . . I think the three decisions taken together demonstrate the extreme extent to which the Court is going in submitting the control of diversity litigation in the federal courts to the states rather than to Congress, where it properly belongs.[38]

He further suggests that something foreign to the *Erie* doctrine is being applied, and that cases subsequent to *Erie* may be misconceived.

> What is being applied is a gloss on the *Erie* rule, not the rule itself. . . . There is sound historical reason for believing that one of the purposes of the diversity clause was to afford a federal court remedy when, for at least some reasons of state policy, none would be available in the state courts.[39]

On the question of the substance-procedure problem, the dissent suggests a test which is perhaps more relevant to the real issues which contront the Court:

> The accepted dichotomy is the familiar "procedural-substantive one. . . . [I]t is Congress which has the power to govern the procedure of the federal courts in diversity cases, and the states which have that power over matters clearly substantive in nature. . . . *The real question is not whether the separation shall be made, but how it shall be made;* whether mechanically by reference to

[36] *Id.* at 552.
[37] *Id.* at 557.
[38] *Id.* at 558.
[39] *Ibid.*

> whether the state courts' doors are open or closed, or by a consideration of the policies which close them and their relation to accommodating the policy of the *Erie* rule with Congress' power to govern the incidents of litigation in diversity suits. (emphasis added)[40]

The test suggested is explained by reference to the *Cohen* case,[41] involving state statute requiring a bond as a condition precedent to stockholder litigation.

> Whether or not the [statute in *Cohen*] is conceived as creating a new substantive right, it is too close to controlling the incidents of litigation rather than its outcome. . . . It is a matter which in my opinion lies within Congress' control for diversity cases, not one for state control or to be governed by the fact that the state shut the doors of its courts unless the state requirements concerning such incidents of litigation are complied with.[42]

This reasoning and test suggested by Justice Rutledge can perhaps be paraphrased in the following manner: (1) Congress clearly has the authority to control the incidents of litigation (procedure) in the federal courts. (2) State law controls in diversity cases only when it is substantive law. (3) Since almost any state statute could, if carried to its logical extreme, be considered as creating a substantive right, the real question is whether it affects an incident of litigation. (4) If the statute in question is designed to control the manner of litigation (rather than being principally designed to affect the outcome), it must yield to the Federal Rules of Civil Procedure.

If this is a fair interpretation of the criteria Mr. Justice Rutledge advocated, his suggestions were, to some extent, adopted, at least *sub silentio,* by the Supreme Court in Byrd v. Blue Ridge Rural Electric Cooperative, Inc.[43] and in *Hanna v. Plumer.*[44] The Court appears to have done something of an about-face and concluded that there are areas of law in which federal policy requires that the Federal Rules be followed, even if the state law in question is arguably substantive.

The *Byrd*[45] case reached the Court in 1958. The controversy centered around the state definition of "employer" for Workmen's Compensation. Plaintiff, who was injured while working on defendant's property, sued the out-of-state corporation in the federal district court. The defendant contended, as a defense, that plaintiff's exclusive remedy was under the state Workmen's Compensation Act since the defendant was within such statutores definition of "employer." However, in order to be within that definition, it was clear that certain facts had to exist. Had the action

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[40] *Id.* at 559.
[41] 337 U.S. 541 (1949).
[42] *Id.* at 560.
[43] 356 U.S. 525 (1958).
[44] 380 U.S. 460 (1965).
[45] 356 U.S. 525 (1958).

been begun in the state judicial system, a finding of fact would have been made by the Industrial Commission prior to consideration by a court. Thus, facts to make the statute applicable would have been found prior to any possibility of a jury consideration of other issues.

In *Byrd,* the Court held that the federal policy in favor of a jury trial controlled as against a state court holding that facts making applicable the statute in question were solely within the province of the court to decide. This conclusion is reached by a somewhat complex syllogism involving a re-interpretation of *Erie* and *Guarantee Trust.*

> *First.* It was decided in *Erie R. Co. v. Tompkins* that the federal courts in diversity cases must respect the definition of state-created rights and obligations by the state courts. We must, therefore, first examine the rule in [the state case] to determine whether it is bound up with these rights and obligations in such a way that its application in the federal court is required.
> We find nothing to suggest that this rule was announced as an integral part of the special relationship created by the statute. Thus the requirement appears to be merely a form and mode of enforcing the immunity . . . and not a rule intended to be bound up with the definition of the rights and obligations of the parties.[46]
> *Second.* But cases following Erie have evinced a broader policy to the effect that the federal courts should conform as near as may be—*in the absence of other considerations*—to state rules even of form and mode where the state rules may bear substantially on the question whether the litigation would come out one way in the federal court and another way in the state court if the federal court failed to apply the local rule.
> *But there are affirmative countervailing considerations at work here.* The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command—of the Seven Amendment, assigns the decisions of disputed questions of fact to the jury.[47] (emphasis added)
> *Third.* We have discussed the problem upon the assumption that the outcome of the litigation may be substantially affected by whether the issue of immunity is decided by a judge or a jury. . . . We do not think the likelihood of a different result is so strong as to require the federal practice of jury determination of disputed factual issues to yield to the state rule in the interest of uniformity of outcome.[48]

The "affirmative countervailing considerations" which the court enumerates amount, essentially, to federal policy (which includes the authority of the federal courts to control the incidents of litigation). By making the "outcome of the litigation" the last to be considered, the

[46] *Id.* at 535-536.
[47] *Id.* at 536-537.
[48] *Id.* at 539-540.

change in approach is clear; if a Federal Rule applies to the situation, and if there is an affirmative federal policy supporting such Rule, then the state rule will not be followed, even if it might substantially affect the outcome of the litigation. The fact that the right to a jury trial was involved should not change the complexion of the decision; the Court expressly disclaims any suggestion that it is deciding this case on the basis of a constitutional mandate.[49]

Even the most conservative reading of *Byrd* cannot but admit the greater weight given to federal policy and the independence of the federal judicial system. Although, of course, lower court decisions were far from unanimous, a tendency to accord greater significance to the Federal Rules was becoming evident. In numerous instances the Federal Rules were upheld, for example, against the onslaught of state rules of evidence,[50] and of substitution of parties.[51]

Perhaps the most emphatic (and dramatic) expression of support for the Federal Rules of Civil Procedure was made by the United States Supreme Court, itself, in *Hanna v. Plumer*,[52] decided in 1965. At issue here was the validity of service of process when executed in exact compliance with the Federal Rules (and consequently, the validity of the method of invoking a federal court's jurisdiction was also at stake). The defendant administrator, who was served according to Rule 4 (d) (1), contended that the service was invalid under a state statute requiring in-hand service on an executor or administrator (or filing with the probate court). Had the Court upheld the defendant's contention, the statute of limitations would have prevented further action by the plaintiff.

In a lengthy and significant footnote,[53] the Court evaluates the state policy upon which the in-hand service requirement is based. Finding that actual notice is the controlling state policy, and that the defendant does *not* claim lack of actual notice, the Court concludes that the Federal Rule controls the action since it is based on the same policy. A test for the validity of a challenged federal rule is set out, which sounds remarkably like the test that appeared to be adopted in *Sibbach v. Wilson*[54] some twenty-four years before.

> We conclude that the adoption of Rule 4 (d) (1), designed to control service of process in diversity actions, neither exceeded the congressional mandate embodied in the Rules Enabling Act nor transgressed constitutional bounds, and that the Rule is

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[49] *Id.* at 537, footnote 10.
[50] Hope v. Hearst Consolidated Publications, 294 F.2d 681 (1961); Monarch Ins. Co. v. Spach, 281 F.2d 401 (1960).
[51] Iovino v. Waterson, 274 F.2d 41 (1959).
[52] 380 U.S. 460 (1965).
[53] *Id.* at 462-463, footnote 1.
[54] 312 U.S. 1 (1941).

> therefore the standard against which the District Court should have measured the adequacy of the service.[55]

The Court realizes that this is not in complete accord with all the prior interpretations given to the *Erie* decision. To an extent the prior decisions are re-interpreted and to extent modified. The overall concern with forum shopping is apparent.

> Erie R. Co. v. Tompkins . . . overruling Swift v. Tyson . . . held that federal courts sitting in diversity cases, when deciding questions of "substantive" law, are bound by state court decisions as well as state statutes. *The broad command of Erie was therefore identical to that of the Enabling Act:* federal courts are to apply state substantive law and federal procedural law.[56] (emphasis added).
>
> "Outcome-determination" analysis was never intended to serve as a talisman. . . . Indeed, the message of York itself is that choices between state and federal law are to be made not by application of any automatic, "litmus paper" criterion, but rather by reference to the policies underlying the *Erie* rule.[57]
>
> The Erie rule is rooted in part in a realization that it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in a federal court. . . . The decision was also in part a reaction to the practice of "forum-shopping" which had grown up in response to the rule of Swift v. Tyson.[58]

At this point, the Court begins applying the above reasoning to the facts of this case. First the court notes that the anti-forum-shopping policy of *Erie* will not be defeated by application of the Federal Rule in question because, as opposed to the state rule advanced, "the difference between the two rules would be of scant, if any, relevance to the choice of a forum."[59] Then the Court concludes that, even if it would effect the choice of forum, *Erie* and *York* are not the proper criteria by which to measure the validity, and thus the applicability of a Federal Rule. On the basis of this reasoning, the test *Hanna* directs to be applied to a Federal Rule is virtually as stated in *Sibbach v. Wilson.*[60]

> When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided Erie choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.[61]

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[55] *Id.* at 463-464.
[56] *Id.* at 465.
[57] *Id.* at 466-467.
[58] *Id.* at 467.
[59] *Id.* at 469.
[60] 312 U.S. 1 (1941).
[61] Hanna v. Plumer, 380 U.S. 460, 471 (1965).

This standard, as the concurring opinion points out, makes it virtually impossible to defeat any federal rule. And further, this test is to be applied to "matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either."[62] Presumably, since the Court, Advisory Committee and Congress are all rational men, and have classified all the rules as procedural, all such rules are invincible. The concurring opinion of Mr. Justice Harlan suggests another test which he argues would not cloak the Rules with invincibility, and would give the necessary weight to both state policy and the anti-forum-shopping policy of the Court. Weight should be given, he suggests, to "a State's substantive regulation of the primary conduct and affairs of its citizens."[63] Essentially, he would have the Federal Ruly apply when "[t]he choice of the Federal Rule would have . . . no effect on the primary stages of private activity from which the (action) arises, and only the most minimal effect on behavior following. . . ."[64] Conversely, the Federal Rule would give way to the state law when the state law . . . "was designed and could be expected to have a substantial impact on private primary activity."[65]

II. Basis and Development of Long-Arm Statutes

The advent and evolution of the *Erie* doctrine is perhaps related and analogous to the development of the present long-arm statutes. For clarity of presentation, the development and expansion of state jurisdiction will be discussed first, then relations between the long-arm and *Erie* will be suggested.

A. *Federal Development*

Congress has long given federal district courts diversity jurisdiction (when there is no federal question involved) through various statutes, culminating presently in 28 U.S.C. § 1332:

> (a) The district court shall have original jurisdiction of all civil actions where the matter in controversy . . . is between—
>
> (1) Citizens of different States;
>
> (2) Citizens of a State, and foreign states or citizens or subjects thereof; and
>
> (3) Citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

Without more, this grant of jurisdiction is limited only by the ruling in *Strawbridge v. Curtis*[66] that no one state or its citizens may be on both sides of a diversity action. The methods available by which to invoke this jurisdiction have, however, served as a limiting factor.

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[62] *Id.* at 472.
[63] *Id.* at 476.
[64] *Id.* at 477.
[65] *Ibid.*
[66] 3 Cranch 267 (1806).

Federal diversity jurisdiction is invoked by the service of process.[67] Amenability to service is limited by several factors. First, the Federal Rules themselves determine the scope of federal process. In certain instances, however, the Federal Rules specifically incorporate state law. Consequently, the effective limit of state process is also an effective limit on the process of a federal court sitting in that state.

Since the Federal Rules incorporate state law as to service of process, and since it would not appear that state process can be validly served unless the state has jurisdiction, the scope of state jurisdiction over non-residents is highly relevant in federal diversity cases. A brief discussion of the major theories upon which state jurisdiction has been delineated is necessary in order to discuss the implications of *Erie* on state long-arm statutes.

Perhaps the classic starting point in a summary of the scope of state jurisdiction is *Pennoyer v. Neff*.[68] Here a plaintiff had sued a non-resident defendant in a state court. The defendant was "served" only by publication. After a default judgment, property within the state owned by the defendant was levied upon and sold in satisfaction of the default judgment. Title to this property was challenged in the federal court on the grounds that the state had no jurisdiction to enter the judgment pursuant to which title was transferred.

The Supreme Court concludes that personal jurisdiction was not attained over the non-resident when notice was given only by publication. It is further suggested that any form of constructive service would be insufficient to obtain *in personam* jurisdiction over a non-resident.

> The several states are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one state have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions.[69] Substituted service by publication, *or in any other authorized form,* may be sufficient to inform parties of the object of proceedings taken where property is once brought under the control of the court by seizure or some equivalent act. . . . But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely *in personam,* constructive service in this form upon a non-resident *is ineffectual for any purpose.*[70] (emphasis added)

Other language, however, suggests that it is merely the aspect of service by publication and resulting potential for abuse which the court finds traumatic.

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[67] FED. R. CIV. P. 4(a); FED. R. CIV. P. 4(d). (2), (7), (4(e).
[68] 95 U.S. 714 (1877).
[69] *Id.* at 722.
[70] *Id.* at 727.

> If, without personal service, judgments *in personam*, obtained *ex parte* against non-residents . . . upon mere publication of process, which, in the great majority of cases, would never be seen by the parties interested, could be upheld and enforced, they would be the constant instruments of fraud and oppression.[71]

The position that personal jurisdiction could not be obtained over a non-resident in any manner other than by personal service within the forum state proved too strict a doctrine to meet the needs of a progressively more mobile society. Indeed, as much fraud was perhaps caused by this doctrine as it sought to avoid; the mere process of leaving and remaining out of state negated all personal liability which might have been incurred within the state. Consequently, the Court substantially changed its position in *Hess v. Pawloski*.[72]

The *Hess* decision could well be categorized as the first federal scrutiny of a "long-arm" statute. Here a Pennsylvania resident, while operating an automobile on Massachusetts highways, struck and injured a resident of Massachusetts. A Massachusetts statute provided that any such non-residents were deemed to have appointed a specific state officer as the agent for service of process in any action resulting from an accident or collision in Massachusetts involving the non-resident. The statute further required mailing the process to the non-resident, attaching the return receipt to the court record, and allowing the defendant reasonable opportunity to return and defend.

This exercise of personal jurisdiction over a non-resident was held to be compatible with Due Process under the Fourteenth Amendment. The validity of the statute is predicated largely on the police power of the state, which by implication justifies the fiction that a non-resident "appoints" an agent upon whom process may be served.

> In the public interest the State may make and enforce regulations reasonably calculated to promote care on the part of all, residents and non-residents alike, who use its highways. . . . And, in advance of the operation of a motor vehicle on its highway by a non-resident, the State may require him to appoint one of its officials as his agent on whom process may be served in proceedings growing out of such use.[73]

The argument that the fiction of appointment is incompatible with due process is dismissed summarily. "The difference between the formal and implied appointment is not substantial so far as concerns the application of the due process clause of the Fourteenth Amendment."[74]

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[71] *Id.* at 726.
[72] 274 U.S. 352 (1927).
[73] *Id.* at 356.
[74] *Id.* at 357.

In view of the *Pennoyer*[75] language, which suggested that only presence within the state or citizenship would support personal jurisdiction, the use of a fictional "agent" theory in *Hess* is understandable if not justifiable. The greatest difficulty in using an "agent" to establish "presence" is that there is no logical limit to the doctrine. The reasoning in *Hess* logically implies that once a state interest is found in the activities of a non-resident, police power may be applied, an "agent" designated by legislative fiat, and the non-resident subjected to the state's jurisdiction. The "agent" fiction was necessary so long as the requirement of "presence" remained a prerequisite to valid service of process. Modifications of the agency theory soon developed, and the requirement of "presence" evolved some very different notions.

An effort to avoid the fiction of "presence" was evident in *International Shoe v. Washington.*[76] At issue here was whether a foreign corporation, which had no office in the state and technically executed no contracts within the state, was subject to process to enforce the state's Unemployment Compensation tax. Process was served by mailing notice, by registered mail, to the employer at his last known address. The activities of the corporation within the state consisted of employing three salesmen to exhibit samples and solicit orders within the state (which orders could be accepted only by the corporation in an office in another state).

The Court dismisses as without merit the contention that the state statute is a burden on interstate commerce. It then proceeds to demolish the argument that the corporation was not "present" in the state.

> But now that the *capias ad respondendum* has given way to personal service of summons or other forms of notice, due process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."
>
> To say that the corporation is so far "present" there as to satisfy due process requirements, for the purposes of taxation and the maintenance of suits against it in the courts of the state, is to beg the question to be decided. For the terms "present" or "presence" are used merely to symbolize those activities of the corporation's agents within the state which courts will deem to be sufficient to satisfy the demands of due process.[77]

In attempting to delineate the requisite contacts to satisfy due process, the Court also suggests limitations on the state's jurisdiction. "Continuous and systematic"[78] activity will support jurisdiction; "casual presence

[75] 95 U.S. 714 (1877).
[76] 326 U.S. 310 (1945).
[77] *Id.* at 316-317.
[78] *Id.* at 317.

of a corporate agent"[79] or "single or isolated items of activities"[80] will not, however, when the action is unconnected with the activities. (This apparent limitation may in fact be an expansion of jurisdiction.) The test of due process which the Court ennunciates, however, serves only to suggest potential vague limitations.

> The test is not merely . . . whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less. . . . Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations.[81]

In retrospect, what the Court has to say, at this time about the requirements of notice is perhaps suggestive of an approach later taken.

> We are likewise unable to conclude that the service of the process within the state upon an agent whose activities establish appellants "presence" there was not sufficient notice of the suit, or that the suit was so unrelated to those activities as to make the agent an inappropriate vehicle for communicating the notice. It is enough that appellant has established such contacts with the state that the particular form of substituted service adopted there gives *reasonable assurance* that the notice will be actual. . . . Nor can we say that the mailing of the notice of suit to appellant by registered mail at its home office was not reasonably calculated to apprise appellant of the suit.[82] (emphasis added)

International Shoe, then, appears to stand for the proposition that diversity jurisdiction, which relies on state jurisdiction over the defendant, may be invoked when (1) the defendant has sufficient minimal contacts with the forum state (perhaps of a continuous and systematic nature) so that the traditional concepts of fair play and substantial justice are not offended, and (2) notice of the action is reasonably likely to be actual notice.

This hint at the importance of notice was made abundantly clear a few years later in *Mullane v. Central Hanover Bank & Trust.*[83] At issue here is the constitutional validity of state provisions for termination of a common trust fund. The notice required by the state statute was service by publication for all persons beneficially interested.

The Supreme Court recognizes the state interest in regulating common trust funds, and the termination thereof. It points out, however,

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[79] *Ibid.*
[80] *Ibid.*
[81] *Id.* at 319.
[82] *Id.* at 320. For similar language respecting requirements of notice, *see* Hanna v. Plumer, 380 U.S. 460 (1965).
[83] 339 U.S. 306 (1950).

that labeling an action *in rem* or *in personam* is not really relevant in determining whether the service requirements satisfy the mandates of due process. Notice, as close as possible to actual notice, considering all the facts and circumstances, is what due process requires.

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.
> The notice must be of such a nature as reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance. . . .[84]

The Court then measures notice by publication against the requirements of due process and finds it sufficient *only* as to "those beneficiaries . . . whose interests or whereabouts could not with due diligence be ascertained."[85]

The *Mullane* requirements as to notice seem equally applicable actions involving non-residents in other situations. Indeed, the *International Shoe*[86] case hinted at this conclusion. At this point, the fiction requiring appointment of an agent for service of process has logically been discredited.

McGee v. International Life Ins. Co.[87] also abandons the agency fiction, and reiterates that neither "presence" nor "doing business" is the proper test for a state's assertion of valid personal jurisdiction. The facts of this case make it, to date, the Supreme Court's outer-limit of the minimal contact criterion. A California resident purchased life insurance from an Arizona corporation; the Arizona corporation was purchased by a Texas company and the Californian executed a reinsurance contract with the Texas insurers. The reinsurance contract was offered by the Texas company by mail and was the only contract it had in the state of California. The premiums were received in Texas by mail from California.

When the Texas insurance company refused to pay the beneficiary (resident of California) after the death of the insured, suit was brought in California. The state statute under which suit was brought allowed action against foreign insurance corporations on contracts with residents of California, even if the corporation could not be served with process in the state. Notice of the California action was given by registered mail at the principal place of business in Texas. The Supreme Court held that the California judgment thus obtained was valid and entitled to enforcement in Texas by virtue of the Full Faith and Credit require-

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[84] *Id.* at 314.
[85] *Id.* at 317.
[86] 326 U.S. 310 (1945).
[87] 355 U.S. 220 (1957).

ment of the Constitution. The language of the Court suggests a concern with the special nature of insurance contracts, but nonetheless implies a broad basis for state jurisdiction.

> It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State. . . . It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims. These residents would be at a severe disadvantage if they were forced to follow the insurance company to a distant State in order to hold it legally accountable. When claims were small or moderate individual claimants frequently could not afford the cost of bringing an action in a forum —thius in effect making the company judgment proof.[88]

The statement in *International Shoe,*[89] to the effect that inconvenience of the forum would be factor in determining whether due process is violated, appears to be limited by *McGee* language.

> Of course there may be inconvenience to the insurer if it is held amenable to suit in California *where it had this contract* but certainly nothing which amounts to a denial of due process.[90] (emphasis added)

It might be suggested that inconvenience of forum is a risk assumed by those engaging in the insurance business in states other than that of its principal place of business.

The broad sweep of *McGee* was neutralized somewhat by the later decision in *Hanson v. Denckla.*[91] Here, essentially, Florida sought to invoke jurisdiction over a Delaware trust corporation on the basis of a trust agreement executed in Delaware by a resident of Pennsylvania who later became a resident of Florida. Payments from the trust, the assets of which were in Delaware, were made by the Delaware trustee and were received in Florida; the Florida resident exercised some control over the trust, otherwise there was no contact by the Delaware corporation with the state of Florida. The Court mentions the trend toward expanding personal jurisdiction, which was noted in *McGee* and was derived from *International Shoe,* but concludes that this trend is not as all-encompassing as it might appear.

> But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of the state courts. . . . Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States.[92]

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[88] *Id.* at 223.
[89] International Shoe v. Washington, 326 U.S. 310 (1945).
[90] 355 U.S. 220, 224 (1957).
[91] 357 U.S. 235 (1958).
[92] *Id.* at 251.

The Court denies the validity of jurisdiction by Florida over the Delaware corporation and distinguishes this case and *McGee:* "The cause of action in this case is not one that arises out of an act done or transaction consummated in the forum State. In that respect, it differs from McGee v. International Life Ins. Co."[93] The factor in McGee which is significant by its absence in Hanson, is the element of solicitation by the defendant of the contact upon which jurisdiction is predicated. The Court wisely concludes that "[t]he unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum State."[94]

Three justices dissent on the basis that the party who executed the trust in question was domiciled in Florida at the time of such execution. This suggests that a different view of the facts could well give a different result, which, of course, makes the facts upon which jurisdiction is sought to be established tremendously important. It also indicates that a case by case determination will be necessary.

B. *Wisconsin Developments*

With the Court sustaining what appears to be ever broader state jurisdiction over non-residents, many states have adopted statutes which attempt to codify this expanded jurisdiction. The Wisconsin approach to the problem, which is not at all typical, was to write the broadest possible jurisdictional statute[95] assuming it may be limited by future pronouncements of the courts as to the scope of due process. Wisconsin attempts to predicate jurisdiction on any of the following:

(1) local presence or status, which includes residents, domiciliaries, domestic corporations, and activities within the state;
(2) other statutes which provide jurisdiction through special proceedings, such as licensing of foreign corporations;
(3) an act or omission within this state causing injury either within or without the state;
(4) an act or omission without the state resulting in injury within this state when solicitation, services, or products of defendant in the ordinary course of trade were in this state;
(5) a contract for goods or services which is connected with a resident of this state (regardless of where the contract originated or was to be performed, so long as some performance or promise is in this state);
(6) an action involving property in this state;
(7) a deficiency judgment on local foreclosure or resale;
(8) an insurance contract when the event insured against occurs in this state or when the event occurs while the beneficiary is resident of this state;
(9) special situations involving corporate officers and taxes.

[93] *Ibid.*
[94] *Id.* at 253.
[95] WIS. STAT. 262.05 (1965); repealed and re-created by *WIS.* LAWS 1959, ch. 226, § 15, eff. July 1, 1960. For manner of invoking jurisdiction *see* 262.06 WIS. STATS. (1965).

The Revision Notes[96] to this statute clearly indicate the intent of the drafters to make this statute as broad as possible, consistent with the requirements of due process. In fact, this intent has been attributed to the legislation, on the authority of these Notes, by the Wisconsin Supreme Court.[97] Generally, the approach can be described as an attempt to cover every situaiton where there would be any contact with the state, then allow the courts to carve out those contacts which do not satisfy due process, and, conversely, fill-in the concrete situations which are within the language of the statute and satisfy due process.

Since the Federal Rules have incorporated state statutes on jurisdiction by specific reference,[98] and since the Erie doctrine requires that the federal courts follow state court interpretations of its own statutes, the construction placed on sections 262.05 and 262.06 of the Wisconsin Statutes by the Wisconsin Supreme Court is highly relevant. The Wisconsin Supreme Court has had several occasions to interpret this statute. Considered chronologically, there appears to be no noticeable tendency on the part of the court either to expand the boundries of the statute, or to limit them; a pendulum approach might be the best description of an overview of the decisions.

Punke v. Brody[99] is the first case which turned on the interpretation of the new long-arm statute. Here the defendant, a non-resident, had hired a resident to manage several properties in the State of Wisconsin for him. Service was attempted on this agent, but held invalid by the court. At this point, the court appears to be construing the statute strictly.

The service is invalidated because the court finds no affirmative consent by the principal to service on the agent. It is possible that the lack of other jurisdictional allegations required (or allowed) by the statute made the court feel that it would promote abuse of the statute as a whole if it did not strictly interpret the "consent" upon which jurisdiction could be predicated. The counter-argument however, is that all a principal would need to do to remain immune from suit would be to affirmatively prohibit his agent from accepting process. The court further suggests that if the *statute* did specifically authorize service on such an agent, and the cause of action arose from the activities he supervised, it might be constitutionally permissible.

> It may be that a state's assertion of personal jurisdiction over a non-resident who supervises the local activity out of which the cause of action arose would transgress no constitutional limitations. The statute did not so provide, however, and when a statute

[96] 30 WIS. STATS. ANN. 262.05, *Revision Notes*, G. W. Foster, Jr., 1967.
[97] *See* quotations from *Revision Notes* in Flambeau Plastics v. King Bee Manufacturing Co., 24 Wis. 2d 459, 129 N.W.2d 237 (1964); Pavalon v. Fishman, 30 Wis. 2d 228, 140 N.W.2d 263 (1966).
[98] *See* FED. R. CIV. P. 4(d) and (e).
[99] 17 Wis. 2d 9, 115 N.W.2d 601 (1962).

> prescribes how service is to be made, the statute determines the matter even though a different method might have been properly prescribed.[100]

Two years later, the court was faced with a far more complex case, in which the question of jurisdiction was virtually ignored; the holding of the trial court that jurisdiction was valid was accepted with the mere statement that the facts supported the conclusion. This resulted in a *de facto* expansion of jurisdiction under the statute. *Carothers v. Bauer*[101] was a personal injury action arising from a collision in Minnesota involving a Wisconsin resident and a truck driven by one Komro. The status of Komro was the subject of much dispute. Suit was instituted against both Komro and his employer, the Minnesota corporation. The corporation contended that Wisconsin lacked jurisdiction as to it because of insufficient contacts with the state; in addition, it was contended that Komro was an independent contractor rather than employee. The bulk of the opinion is devoted to a determination that Komro was an independent contractor, and the resulting liability of the corporation vis a vis this status.

Although the action was dismissed on the merits as to the corporation, the mere acknowledgment of jurisdiction as to that corporation allows somewhat revolutionary interpretations of the jurisdiction statute. The Supreme Court held only that the facts supported the trial court's finding that 262.05 (1) (d) provided jurisdiction. The facts included a finding that Komro, through whom the bulk of the current contacts with Wisconsin were made, was an independent contractor. Given this fact, the only other contact was through a minor company official who rode the milk run with Komro once a month. Recited as further facts, however, which apparently were deemed to be a basis for jurisdiction, were several contacts (*i.e.* regular milk route) several years before, when Komro was an employee of the corporation. Thus, in fact, the court seems to be allowing jurisdiction over a non-resident to be predicated on either (1) the activity of an independent contractor for such non-resident, or (2) once a month checking on the contractor's activities by a company official, or (3) prior activities of the company, out of which the cause of action did not arise. To call this an expansion of the jurisdictional sweep of 262.05 would be an understatement.

The next case before the court, however, further expanded the concepts embraced in Wisconsin's long-arm provisions. This case was decided the same year as Carothers, and, thus, may merely indicate the then-current attitude of the court rather than a decisional trend. Flambeau *Plastics v. King Bee Manufacturing Co.*[102] was a breach of contract action brought by a Wisconsin seller against an Illinois buyer. The

[100] *Id.* at 13.
[101] 23 Wis. 2d 15 (1964), 126 N.W.2d 758 (1964).
[102] 24 Wis. 2d 459, 129 N.W.2d 237 (1964).

contract was negotiated and executed by correspondence. Defendant had no office or agent in Wisconsin. The products involved were to be manufactured, shipped, and paid for in Wisconsin. After partial performance, the defendant refused to perform further. The defendant was served by leaving the summons and complain with defendant's registered agent at his office in Illinois.

The Wisconsin Supreme Court specifically does not decide whether the defendant's contract alone is sufficient to give Wisconsin jurisdiction over him, but does express doubt that such would be sufficient if the cause of action was unrelated to the contact alleged. The court concludes that jurisdiction under 262.05 (5) is clear.

> In our opinion, the action set forth in the complaint arises out of a promise by defendant to pay for services to be performed by plaintiff in Wisconsin, and, thus, that par. (a) of sec. 262.05 (5) Stats. describes a ground for personal jurisdiction. .. . For the purpose of measuring the extent of defendant's contact with Wisconsin, its alleged obligation to pay part of the cost of the mold "arises" out of the original promise. . . . It is also immaterial that the contract required payment upon delivery of the finished goods, since it is alleged that the parties contemplated that the goods to be purchased would be produced by plaintiff's manufacturing efforts in Wisconsin. In light of the purposes of the statute, a promise to pay for goods to be manufactured by the seller in Wisconsin must be deemed a promise to pay for the services of the seller as well as the transfer of the finished product.[103]

It appears that the defendant here in fact had no contact with the state of Wisconsin other than the contract involved in the suit; otherwise, jurisdiction could have been established without resort to the legal inventiveness above set out. This in turn suggests that the Wisconsin court is not anxious to specifically hold that a single contract supports jurisdiction, but is willing to attribute broad scope to the other aspects of the statute. Thus, the single-contract contact does not suffer from the same potential difficulties in the mind of the court when such contract includes other jurisdictional elements specifically written into the statutes.

However, all the 1964 decisions did not expand the scope of 262.05. *Travelers Insurance Co. v. George McArthur & Sons*[104] denied the applicability of long-arm jurisdiction. The defendant, a Wisconsin corporation, manufactured hammocks and sold them to a Connecticut firm. One of the hammocks was defective and the Connecticut firm paid its customer on the resulting warranty action. Reimbursement from the Wisconsin manufacturer was sought by the Connecticut firm's insurer. As a defense, the Wisconsin defendant sought to implead the Pennsyl-

[103] *Id.* at 466.
[104] 25 Wis. 2d 197, 130 N.W.2d 852 (1964).

vania maker of the hammock frames; however, a difficulty arose because the frames had been sent directly to Connecticut (by the Pennsylvania maker) at the request of, and under contract with, the Wisconsin defendant.

The Wisconsin Supreme Court refused to extend jurisdiction to the Pennsylvania party on the allegation of this single contract. The contract was held to be neither "substantial and not isolated activity" nor "continuous and systematic" activity. The court further rejects the somewhat obtuse argument that "in the ordinary course of business" the goods were sent to Connecticut, but the contract was also part of "the ordinary course of business" and could thus support jurisdiction as "substantial and not isolated activities within this state."[105] The court clearly implies that it might reach a different result if a greater connection with Wisconsin on the part of the Pennsylvania firm could be alleged. This opportunity is provided by remand.

On the facts of this case, Wisconsin has met its single-contract and related cause of action case. Jurisdiction was not extended here. But neither was it decided that a single contract could *never* support jurisdiction. It is significant that the court did not choose to meet head-on the statutory provision which appears to allow a single contract (without more) to provide jurisdiction.[106] Thus, a case by case determination of whether a given single contract establishes sufficient contact with the state to provide jurisdiction—*i.e.* satisfy due process—will be necessary.

Pavalon v. Fishman[107] was a later case, again apparently involving a single contract. Fishman (a non-resident) solicited and sold to Pavalon (a Wisconsin resident) bonds issued by Sulray (a New York corporation). In an action for fraud and misrepresentation, the Wisconsin Supreme Court sustains jurisdiction as to Sulray through a much modified version of the "agency" theory discussed in *Punke v. Brody*.[108] The language of the Court in *Pavalon* best summarizes its position.

> Respondent appears to concede . . . that *Sulray cannot be reached directly under sec. 262.05 (5) (e) Stats.* This would be because (1) no one from Sulray did any bargaining, soliciting, or negotiating with respondent, (2) Sulray did not make any of the promises or representations which give rise to this action for misrepresentation, and (3) there was no affirmative showing that the loan arrangement contemplated a substantial contact with the state as far as Sulray is concerned. Rather, respondent contends, and the trial court in fact found, as a conclusion of law, that *there was personal jurisdiction over Sulray because Divine & Fishman was acting as its agent.* If this was actually the case, *the actions of Divine & Fishman would be attributed to Sulray,*

[105] *Cf.* WIS. STATS. 262.05 (1)(d) (1965).
[106] WIS. STATS. 262.05 (5) (1965).
[107] 30 Wis. 2d 228, 140 N.W.2d 263 (1966).
[108] 17 Wis. 2d 9, 115 N.W.2d 601 (1962).

> *and Sulray would come within the purview of § 262.05 (5) (e).* Consequently, whether or not the trial court had personal jurisdiction of Sulray hinges on the underlying issue of whether Divine & Fishman were acting as the former's agent.[109] (emphasis added)

The court then applies the Wisconsin rule that a broker acts as an agent, finds no showing to defeat the agency here, and affirms jurisdiction. There was no discussion of the *Brody*[110] requirement that an admitted agent must have specific authority to accept service; such requirement may no longer exist.

Perhaps the most startling instance in which Wisconsin has exercised jurisdiction over non-residents is a recent case where the issue of jurisdiction was not raised. *Conklin v. Horner*[111] dealt with an Illinois host and an Illinois guest involved in an automobile accident during a sojourn into Wisconsin. The plaintiff demurred to the affirmative defense that Illinois law controlled. The entire opinion discussed whether the Illinois or Wisconsin host-guest responsibility applied. Wisconsin concluded that since the accident and the injury occurred in Wisconsin, Wisconsin law applied and sustained the demurrer to the affirmative defense.

This is the clearest case imaginable of forum shopping. The Illinois rule was much more strict, so the action was brought in Wisconsin. The failure to discuss the jurisdictional question, together with application of Wisconsin law, suggests a new potential for selecting the state with the most favorable law. Wisconsin is apparently not disposed to discourage such "shopping."

Since under *Erie* and its progeny, federal courts exercising diversity jurisdiction must apply state substantive law, and since the Federal Rules have incorporated by reference the scope of state jurisdiction, federal courts in Wisconsin must follow Wisconsin's interpretation of 262.05 and 262.06 to the extent it does not violate due process.

One potential limitation to this syllogism should, however, be suggested. The federal rules incorporating state law deal with service of process. Wisconsin had recognized the distinction between 262.05 (which provides jurisdiction) and 262.06 (which directs how service shall be made to invoke such jurisdiction). Service, on its face, according to the terms of 262.06 does not per se preclude lack of personal jurisdiction.[112] This would suggest that the federal court could consider itself bound only by the method of service in Wisconsin, and not the personal jurisdiction statute. However, the Supreme Court rejected

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[109] 30 Wis. 2d 228, 234-235, 140 N.W.2d 263, 265-266 (1966).
[110] Punke v. Brody, 17 Wis. 2d 9, 115 N.W.2d 263 (1962).
[111] 38 Wis. 2d 468, 157 N.W.2d 579 (1968).
[112] Stroup v. Career Academy of Dental Technology—Washington, D.C. Inc., 38 Wis. 2d 284, 156 N.W.2d 358 (1968).

essentially this approach in *Hanna v. Plumer*,[113] and held that the *manner* of service was governed by the Federal Rules, as opposed to conflicting state law.

Assuming it beyond dispute, however, that federal diversity jurisdiction is at least co-extensive with the jurisdiction of the forum state, serious policy considerations arise.

(1) Is diversity jurisdiction over non-federal questions really necessary, considering that state jurisdiction of non-residents is potentially limited only by the boundaries of due process as defined by the Supreme Court? It could be argued that diversity jurisdiction originally filled a need (avoiding liability immunity of non-residents) which, by virtue of the long-arm statutes, no longer exists. The fallacy here, of course, is that not all states have equally broad long-arm statutes, and thus the federal court is a necessary balancing system for such differences.

On the other hand, one could contend that the existence of a federal system and its provision for a judicial branch pre-supposes a determination by the drafters of the Constitution that it is desirable to have federal courts generally accessible to residents of all the states. This is evidenced by inclusion of the crux of diversity jurisdiction in Article 3, section 2 of the Constitution of the United States.

(2) If diversity jurisdiction is advisable, should it be drastically limited. The argument is available that no aspect of federalism or the Constitution *requires* that federal courts, exercising diversity jurisdiction, decide more than federal questions. Since any court inherently has the authority to determine its own jurisdiction, subject to legislative requirements, the Federal Rules could be re-drawn to limit diversity jurisdiction to matters involving federal law. This would eliminate all the difficulties raised by *Erie* and its progeny. Such action would, however, perhaps encourage the type of forum-shopping among states which has appeared in *Conklin v. Horner*.[114]

(3) Since the outer limit of state jurisdiction is in fact a federal question—*i.e.* whether due process has been provided—greater certainty would be available if the limits of jurisdiction were set out in the Federal Rules. This would not conflict with *Erie* principles since: (1) it would discourage forum shopping; (2) *Erie* can be read as dealing with the law to be applied once jurisdiction is established, rather than with the question of jurisdiction itself; (3) jurisdictional definitions are within the purview of the Federal Rules by virtue of the Enabling Act[115] and would control even under *Erie*, since jurisdiction is a means of enforcing rights and remedies rather than a right or remedy itself.

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[113] 380 U.S. 460 (1965).
[114] Punke v. Brody, 17 Wis. 2d 9, 115 N.W.2d 263 (1962).
[115] 28 U.S.C. § 2072.

III. Analogies Between Erie and Long-Arm Statutes

To some degree, the development of *Erie* and the development of long-arm statutes have followed analogous paths. Both concepts in essence deal with the role of state law in a system of federalism. In an era of ever-larger and more complex federal government, both doctrines attempt to delineate areas of state authority within the federal system. Clearly, both doctrines have vastly expanded the influence of state law within that system.

The limit on this state influence, it is suggested, is based on the concept of federalism. If the federal judicial system is to remain in fact a *federal* system, at some point it must follow its own law. In cases where the *only* basis for jurisdiction is the diversity of citizenship of the parties, the logic and constitutional necessity demanding application of federal rather than state law (or indeed the converse) becomes much more difficult to discern. However, since by the definition of federalism, state and federal courts are not identical judicial systems, the point of division must be determined. Regardless of the language used, this process of demarcation is simply a policy decision.

The policy currently followed is to limit use of federal law, and, consequently, expand the use of state law. This policy is evident in both the exercise of jurisdiction and application of substantive law. Federal law can be relied on only as to the manner of *invoking* jurisdiction of, and administering the process of the litigation in, the federal courts.[116] To this end, the Federal Rules will control over conflicting state law even though this may arguably affect the parties to the litigation in a different manner than would application of state law. In essence, the Court is merely defending its power to determine the manner in which federal courts will be run. Certainty and uniformity in the administration of the federal judicial system appear to be the not-unnecessary goal.

To some extent, however, both goals may have suffered something of a set-back when state jurisdictional laws were incorporated by reference into the Federal Rules. This occurred, apparently, under the auspices of a policy of foregoing greater state-law influence. Relevant Supreme Court decisions and Advisory Committee Notes[117] evidence great support for expanded state jurisdiction.

As the sovereignty of one state is limited by the sovereignty of all the others, there must be a limit imposed on the jurisdictional authority of all. Only the federal court system is capable of imposing this limit because, again, the very crux of federalism is involved. Federalism, of course, pre-supposes a conglomerate of states with equal authority and an overriding system with the power to limit the authority of the several states. For these reasons, there must be a limit to the power of a state

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[116] Hanna v. Plumer, 380 U.S. 460 (1965).
[117] Fed. R. Civ. P. 4, 1967 Cum. Ann. Pocket Pt. p. 73.

to reach beyond its physical boundaries and subject a person to its authority.

The limit on this power has been defined by "due process," "fundamental fairness," and various other phrases, all of which deal with the same concept. The core of the limitation may rest on the concept of federalism which makes each state the master of (almost) all it surveys *within its geographical boundries;* states may not impose their authority upon persons and transactions in other states, unless the home state has a superior interest. State "interest," of course, must be more than academic; the police power of the state has in almost all instances been the basis for the exercise of state jurisdiction over non-residents.

However, a nebulous "something more" than police power also appears to be involved. A state may have a valid interest in certain types of transactions, generally without having the right to exercise its authority over a particular transaction."[118] It is apparently also necessary that the party, over whom the state seeks to assert its authority, have had some sort of voluntary self-initiated contact with that state. The degree of validation necessary is unclear, and may well be restated in the future. It may be that this "something more" which currently appears to be firmly required, will drop out of the test. Police power is at least a better understood concept, which would, perhaps, provide more clearly defined limits to state jurisdiction. At least greater certainty, if not greater uniformity, would be likely to result.

Another aspect of the policy problem is that the very long-arm statutes the court applauds impair uniformity among the federal courts. The jurisdictional statutes of each state differ. Thus, their incorporation by reference into the Federal Rules makes non-uniform these very Rules. Consequently, since Federal Rules will control the conduct of the suit, but the Rules in fact differ depending upon the state in which the Court sits, there may be a great revival, among the federal courts, of the forum-shopping Erie hoped to defeat.

It seems clearly within the power of the federal courts under the Enabling Act[119] to avoid this, by adopting their own jurisdictional definitions. The question is whether they will do so.

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[118] *See* Hanson v. Denckla, 357 U.S. 235 (1958).
[119] 28 U.S.C. § 2072.